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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 670

THE BOARD OF EDUCATION OF THE CITY OF BIRMINGHAM, ET AL., *Petitioners,*

v.

DWIGHT ARMSTRONG, ET AL., *Respondents.*

LINDA SUE GIBSON, ET AL., *Petitioners,*

v.

CAROLYN ELEANOR HARRIS, ET AL., *Respondents.*

LAWRENCE ROBERTS, ET AL., *Petitioners,*

v.

RALPH STELL, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of The United States.

Each of your petitioners was a [illegible] in a District Court action and is now an appellee in an appeal pertinent thereto before the Fifth Circuit Court of Appeals. In each appeal pending and [illegible] the parties [illegible]

inal mandatory injunction which has *de facto* reversed the order or judgment appealed from by awarding as against each of your petitioners the affirmative relief to which the respective respondents had failed to sustain their right in the trial court. Petitioners, contending that the form of such orders constitutes an impermissible departure from normal appellate processes, pray the issuance of a writ of certiorari directed to the United States Court of Appeals for the Fifth Circuit limited to the question of the formal validity of such orders as an allowable or proper exercise of appellate judicial power.

The prayer is made for joint consideration of all four[1] cases under Rule 23(5) on the ground that the four orders in question are substantially identical, present the same issue of law and may constitute the entire class of such orders since your petitioners know of no similar rulings by any other Court of Appeals.

OPINIONS BELOW

The opinions of the Court of Appeals are printed in the appendix and have been reported as follows: *Stell* v. *Savannah-Chatham County Board of Education*, 318 F. 2d 425 (May 24, 1963); *Davis* v. *Board of School Commissioners of Mobile County, Ala.*, 322 F. 2d 356 (July 9, 1963); *Armstrong* v. *Board of Educa-*

[1] In addition to the three captioned cases, a motion to be permitted to file an application for rehearing limited to the form of the order concerned is filed herewith in *Board of School Commrs. of Mobile, et al.* v. *Birdie Mae Davis, et al.*, Oct. Term, 1963, No. 348, cert. den. 375 U.S. 894 (Oct. 28, 1963). The inclusion of the *Davis* case is solely to have before the Court on a single application, the four related cases in which such appellate orders have been issued.

tion of City of Birmingham, Ala., 323 F. 2d 333 (July 12, 1963); and *Harris* v. *Gibson and Glynn County Board of Education*, 322 F. 2d 780 (September 12, 1963).

The opinions of the District Courts are not sought to be reviewed herein but are included in the appendix for the Court's reference. Two have been officially reported, *Davis* v. *Board of School Commissioners*, 219 F. Supp. 542 (S.D. Ala. June 24, 1963) and *Armstrong* v. *Board of Education*, 220 F. Supp. 217 (S.D. Ala., May 28, 1963). At the time of the issuance of the order of the Fifth Circuit in *Stell* v. *Savannah-Chatham County Board of Education*, only the preliminary findings given in the appendix had been issued. The District Court's decision, as thereafter entered with the Clerk, is reported at 220 F. Supp. 667 (S.D. Ga. 1963).

The denial of the application for issuance of a writ of certiorari in *Davis* is reported at 375 U.S. 894 (October 28, 1963).

JURISDICTION

The review authority of this Court prior to the rendition of a judgment or decree by a Court of Appeals is conferred by 28 U.S.C. § 1254(1); and since each case is now so pending in that Court, this application comes within the time limited by 28 U.S.C. § 2101(e). The dates of the issuance of the orders sought to be reviewed are as given in the preceding section.

QUESTION PRESENTED

Does a Court of Appeals have power, pending its determination of an appeal on the merits, to issue an original mandatory injunction which

(a) reverses the appealed-from order or judgment of the District Court by granting the affirmative relief prayed by the unsuccessful parties in the trial court;

(b) alters both the *status quo ante litem* and the *status quo* as of the time the appeal was taken; and

(c) directs the trial court to sign and issue as its own the interim reversal of its earlier order?

STATUTES INVOLVED

28 U.S.C. § 1292(a)(1). Interlocutory Decisions.

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;" (As am. Oct. 31, 1951, c. 655, § 49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770)

28 U.S.C. § 1651(a). Writs.

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions

and agreeable to the usages and principles of law." (June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, § 90, 63 Stat. 102).

28 U.S.C. § 2106. Review: Determination.

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." (June 25, 1948, c. 646, 62 Stat. 963).

STATEMENT OF THE CASES

A number of facts are common to all cases. Each of the four is a school desegregation case—Savannah and Brunswick, Georgia, and Birmingham and Mobile, Alabama—brought as a suit in equity under 28 U.S.C. 1343(3). The jurisdiction of the District Courts has been invoked under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution as implemented by the Civil Rights Act, (42 U.S.C. § 1983). The respondents have had in each case the same or associated counsel and have asked the same type of relief, resulting in substantial similarity in their pleadings and motions both in the District Courts and in the Court of Appeals for the Fifth Circuit.

In each trial court the respondents' pleadings have prayed a permanent injunction directing some form or plan of desegregation and respondents have asked the same relief by way of preliminary injunction. In each case, the District Court concerned has issued a

judgment or order which respondents have appealed to the Court of Appeals as constituting a denial of the injunctive relief so demanded.

On taking each appeal, respondents have prayed an original appellate interlocutory injunction for the same affirmative relief as had been denied by the lower court. The ground stated by respondents has been that the clear absence of legal merit in the rulings of the District Courts makes any delay in granting them final relief, an irreparable injury. The Court of Appeals on each appeal has agreed with respondents and, acting on an accelerated basis[2] without a record or a transcript of the proceedings below, has reversed the lower court by granting the application for appellate injunctive relief substantially as requested. On each appeal, the Circuit has issued its mandate in the form of an order to be signed and issued as that of the District Court from which the earlier order not yet determined on appeal, had issued.[3]

In somewhat greater detail, the nature of the proceedings and character of the orders issued by the trial and appellate courts are here given in the chronological order of the cases.

(a) Savannah-Chatham Board of Education, et al v. Ralph Stell, et al. (5th Cir. Ct. of App. No. 20557)

This action was brought on behalf of negro school children in Savannah alleging injury caused by separate schools and praying preliminary and permanent injunctive relief requiring the defendant School Board

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[2] From application through hearing to decision, *Stell*, 4 days; *Davis*, 8 days; *Armstrong*, 39 days; *Gibson*, 2 days.

[3] Although the Fifth Circuit in the later *Davis*, *Armstrong* and *Gibson* opinions refers to *Stell* as authority for the form of injunction in question, Judge Cameron identifies an unpublished order two days earlier as being the first. (App. pp. 60-4a)

of Savannah-Chatham County to submit a plan to reorganize the school system into what plaintiffs described as a "unitary nonracial system". At the trial, proof was made on defense that the plan proposed by respondents would injure both the negro and white school children in Savannah. On the Court's inquiry, respondents refused to proffer any evidence in rebuttal of this issue or in support of the injury averments in their complaint, stating that the law so conclusively presumed such injury to their class that no evidence to show other or different injury in the Savannah area could be considered by the trial court.

The District Court disagreed and, at respondents' request at the close of trial (May 13), immediately issued its preliminary judgment, denying the prayer of the complaint, and giving respondents a right to reopen for further proof. (App. pp. 82a-90a)

Respondents appealed and moved for a preliminary appellate injunction on May 20, 1963, for the same relief denied below (*Stell* Rec. 55). The Court of Appeals set this for hearing on May 24 (*id.* 80), heard it (*id.* 135), and on the same day, entered its order granting the requested injunction (*id.* 136) on the basis of the "All Writs" statute, 28 U.S.C. § 1651(a) (App. p. 1a). For its direction to the District Court to enter the order as its own the Court of Appeals additionally referred to this Court's ruling in *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399 (1923).

(b) Board of School Commissioners of Mobile County, et al. v. Birdie Mae Davis, et al. (5th Cir. Ct. of App. No. 20657)

The complaint in this case was substantially similar to that in *Stell*, and respondents, in addition to praying a permanent injunction therefor, moved for a prelimi-

nary injunction requiring the submission within thirty days of a desegregation plan to commence in September, 1963. The preliminary injunction in the form prayed by plaintiffs was denied on June 24, 1963, but the Court directed the School Board to submit such a plan to be heard at the trial, which had then been scheduled for November.[4]

On July 1, 1963, respondents moved the Court of Appeals for an injunction pending appeal "and for other orders". On the same day the Court ordered a hearing on July 8 (Davis Rec. p. 19) and granted respondents' application on July 9 (*id.* pp. 21-8). In its decision the Court said:

> "The 'All Writs' statute, 28 U.S.C.A. § 1651 gives us the power to grant the relief sought by the plaintiffs. *Stell* v. *Savannah-Chatham County Board of Education*, Fifth Circuit, 1963, F. 2d [No. 20557, May 24, 1963]. However, as in that case, we think it is more appropriate to frame the injunction and direct by mandate that this injunction be made the order of the District Court." (App. p. 9a)

On an application for rehearing, the order was recalled and reissued on July 18 to conform to the form used in the interval in the Court's decision in *Armstrong*. In the opinion of the dissenting Judge:

> "The modification by the majority of their prior order in this case compounds error. (App. p. 13a).
>
> * * *
>
> ". . . what has been done is at the expense of the judicial process. A Court of Appeals should not sit as a District Court in chancery . . . without facts before it to serve as a basis for the decree.

[4] It was tried on the dates scheduled and is now *sub judice*.

> The All-Writs Statute, 28 U.S.C.A. § 1651, does not authorize this . . . more constitutional rights will be lost than gained in the long run by departure from the procedures which have stood the test of time, and which are a part of due process of law as we have heretofore known it." (App. p. 15a).

A dissent was also filed by Judge Cameron after rejection of his recommendation for an *en banc* hearing (*Davis* Rec. 41). A petition for review by certiorari on the merits was filed and denied by this Court on October 28, 1963; *Board of School Commissioners of Mobile County* v. *Davis*, 375 U.S. 894. No reconsideration of the merits discussed in that application is requested, the concurrent motion served herewith being intended to consider only the formal validity of the injunctive order of the Fifth Circuit.

(c) Armstrong v. Board of Education of City of Birmingham, Ala. (5th Cir. Ct. of App. No. 20595)

In this case, as in the two cases previously detailed, the complaint sought a mandatory injunction requiring the School Board to reorganize the school system along stated lines. A preliminary injunction for the same relief was made but by stipulation was merged into the prayer for permanent relief and the case was tried on the merits. The Court found that the plaintiffs in the case had failed to make any effort to comply with the Alabama Pupil Placement Act which this Court had held constitutional; *Shuttlesworth* v. *Birmingham Board of Education*, 358 U.S. 101 (1958). The District Court retained jurisdiction to rehear the plaintiffs on any contention that the manner of application to them of that statute was improper. (App. p. 108a). On June 3, 1963, the *Armstrong* respondents moved

the Court of Appeals to issue an injunction pending appeal which would grant the relief denied below. (*Armstrong* Rec. p. 1). This was heard on June 26 (*id.* 21) and the requested injunction was granted on July 12, Judge Gewin dissenting (App. p. 19a). An application for rehearing *en banc* was denied July 22, Judge Cameron filing an additional dissenting opinion on July 30.

In its decision, the Circuit Court, Rives, J., directed the issuance of an order by the District Court "In line with the procedure . . . in *Stell*, . . ." (App. p. 29a) and Tuttle, C. J., concurring specially, stated that a definite plan "should be required by an injunction . . . pending the appeal of this case on the merits in this Court. See *Stell* . . . . *Davis* . . ." (App. p. 31a). Judge Gewin, in an extended dissent, stated:

> "It should be noted quickly that the majority opinion leaves little to be decided when the case reaches this Court on the merits. Under the guise of 'injunction pending appeal' that opinion substantially decides the case and renders moot many questions which could arise when the case reaches the Court for final decision after a review of the record . . . The action in this case is taken without any pretense that the Court has taken so much as a hurried glance at the record." (App. p. 32a)

Judge Gewin then discussed the questions involved in issuing such an injunction pending appeal and distinguished the action taken in *Stell* on the ground that the Court had there considered it was reviewing an interlocutory ruling. (App. p. 41a)

Judge Cameron also dissented saying:

> "The decision of this panel involves questions of procedure which have for some weeks plagued

and are still plaguing the Court. The Judges of the Court are sharply divided on these questions and not only the lawyers of the Circuit, but the public generally, are displaying open concern with respect to inconsistent positions which they conceive are being taken by the Court. . . .

"The procedure followed by the majority here is one which, in my opinion, is not sanctioned by the law. The hearing before these three Judges *was not an appeal*. Rather, it was what the Third Circuit has termed something 'in the nature of an original proceedings . . .) It was the substitution of a hearing on 'injunction pending appeal' for a hearing on appeal. Theoretically the appeal is still pending, but it is apparent that there is little or nothing more to hear since the decision and order of the majority of the panel are on the merits of the case, deciding in full, without the benefit of any record of the evidence in the lower court, the questions of law and fact which were before that court in its extended hearing. (App. pp. 58a-60a).

* * *

"The last sentence of Judge Bell's special concurrence in the July 9th hearing characterizes poignantly the dilemma into which this Court has been plunged since it set itself the task of inventing special procedures for the handling of such cases:

> "'This case serves as a classic example of the pitfalls to be encountered, with the attendant disruption and delays in the orderly administration of justice, when courts depart from the time-tested processes of law.'" (App. p. 60a)

(d) Harris et al. v. Gibson and Glynn County Board of Education et al. (5th Cir. Ct. of App. No. 20871)

This action followed the pattern of the preceding three, except that in this case respondents filed their prayer for temporary and permanent injunctions as

intervenors in a suit brought to restrain the Board of Education from effecting a pupil transfer except in accordance with Court order and the Georgia School Code. The action was commenced in August, 1963, and on motion of the *Gibson* respondents to intervene and be heard on the broad issue of desegregation, the Court set the matter down for a pretrial hearing on September 5. At that hearing, the Court allowed the requested intervention and then heard arguments both on respondents' motion for a preliminary injunction and the petitioners' motion for judgment for failure of the School Board to have held a public hearing under the Georgia School Code prior to their approving the transfers in question.

To limit the issues and to obviate the jurisdictional objection, the Court by pretrial order directed the School Board to promptly hold an open record hearing under the Georgia Code, limiting the parties on the subsequent trial to the issues and evidence presented before the Board. The Court further required the Board to recommend a complete plan of desegregation for the County, including the six transfers complained of.

Respondents appealed this order to the Fifth Circuit on the ground that it constituted a denial of their motion for a preliminary injunction enforcing the transfers before trial. At the same time, they prayed an interlocutory appellate injunction for the relief stayed below. The order of the District Court was entered on September 6; the application to the Court of Appeals was filed on September 10 and was heard and decided on September 12. (*Gibson* Rec. 8-9, 22 and 23) In its decision granting the injunction to respondents, the Court of Appeals held that the pretrial order of

the District Court was both an interlocutory appealable order under 28 U.S.C. § 1292 and an appealable final order under 28 U.S.C. § 1291. (App. p. 89a)

REASONS RELIED ON FOR ALLOWANCE OF WRIT

Each of the considerations referred to in this Court's Rule 19(1)(b) exists with respect to the Fifth Circuit opinions for which review is sought.

1. They are contrary to the decisions in the only other four cases which petitioners have found of an application to a Federal Court of Appeals for a mandatory injunction to grant final relief pending determination of an appeal on the merits. There is one such case each in the Sixth and Ninth Circuits, the other two being in the Fifth Circuit itself (*infra* p. 21-3).

2. The Federal law question regarding the powers of United States Courts of Appeals to grant this type of order—either as a matter of inherent authority, by precedent in equity, or through legislative enactment, is both unique and important. The four orders in question appear to be the only four published orders of this nature issued by any United States Court of Appeals.

3. In the opinion of your petitioners, the action of the Court of Appeals in the issuance of the orders concerned has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision. Petitioners concede that applications such as this are not favored because made during the pendency of appeals in the Court of Appeals. However, it is the position of petitioners, and one we believe reasonably taken, that the "deviation from normal appellate processes"

phrase in this Court's Rule 20 is more descriptive of the action of the Court of Appeals in the four captioned cases than of the present application for review.

4. Petitioners recognize that the merits of the pending appeals involve controversial political and social issues, issues evocative of strong emotional reactions not always limited to the protagonists. Since we pray no review on these issues, we do not urge their importance as a basis for the granting of this petition. We do urge the corollary, however, that such cases should receive the same tempered measure of judicial consideration as more mundane issues, and should not become a quasi-administrative and summary exception to the normal procedures of the Judicial Branch.

5. Three of the four orders abrogate otherwise applicable and constitutionally valid state legislation.

ARGUMENT

What we are here concerned with, is a relatively narrow question. We deal with mandatory as opposed to prohibitory injunctions and only those which alter rather than maintain or restore a *status quo*. We are concerned solely with appellate interlocutory injunctions and only such of those as grant relief to the appellant which is the same as the relief he seeks by appellate process itself, i.e., 'final' relief in the action.

It would be futile to deny that the broad powers of the United States courts include every form of writ which may be required to assure to the ultimately prevailing party an effective and meaningful remedy. We do deny, however, that such authority extends to the granting of anticipatory relief in the nature of instant reversal based on appellate prejudgment of the merits.

In the following argument, your petitioners will attempt to show first, that there is no statutory basis for the orders in question nor any precedent in equity or in the opinions of other courts. Second, we will endeavor to show that the issuance of the orders in question conflicts with decisions in the Sixth and Ninth Circuits and with the earlier decisions of the Fifth Circuit and deviates from the judicial policies declared by this Court.

I. THE AUTHORITIES CITED BY THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DO NOT SUSTAIN THAT COURT'S POWER TO ISSUE A MANDATORY INJUNCTION, GRANTING THE FULL RELIEF SOUGHT BELOW, PENDING DETERMINATION OF AN APPEAL ON THE MERITS.

(a) The "All Writs" Statute (28 U.S.C. § 1651)

(1) Statutory Language

The Court of Appeals assumed jurisdiction to grant relief in these cases primarily under the "All Writs" statute, 28 U.S.C. § 1651, which reads:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their jurisdictions *and agreeable to the usages and principles of law.* (Emphasis added).

This Court has held that the power given to the courts under this provision of the Judicial Code is limited, and must be exercised in accordance with the principles of equity jurisprudence which were known to the common law. (*United States* v. *Morgan*, 346 U.S. 502 (1954); *United States* v. *Hayman*, 342 U.S. 205, 221 n. 35 (1952)), and which have attached themselves over the years to the particular writ in question (*Price* v. *Johnston*, 334 U.S. 266, 282 (1948)).

Thus, in *DeBeers Mines* v. *United States*, 325 U.S. 212 (1945), this Court vacated an injunction issued under the statute, after reviewing the "course of decision in chancery," and finding that "No relief of this character has been thought justified in the long history of equity jurisprudence." (*id.*, 223)

(2) Principles of Equity

The purpose of the writ of preliminary mandatory injunction at common law was "wholly preventive, prohibitory or protective," with its use being restricted to situations where its effect would be to restore the plaintiff to his "former" or "original" position. 4 *Pomeroy's Equity Jurisprudence*, §§ 1337, 1359 (4th ed. 1919). Thus, where the object of the writ is to maintain or restore the *status quo ante litem*, the power of the federal courts to issue preliminary mandatory injunctions is clearly recognized. *In re Lennon*, 166 U.S. 548 (1897); *Bergen Drug* v. *Parke Davis Co.*, 307 F. 2d 725 (3rd Cir. 1962).

The preliminary mandatory injunction, like the preliminary prohibitory injunction, has traditionally served "to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began." (*Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 742 (2d Cir. 1953)). But its issuance can be justified only when necessary to preserve or restore the *status quo* pending final determination of the merits of a litigation. 28 Am. Jur. "Injunctions" § 17; 15 ALR 2d 213, 234; *Toledo A.A. and N.M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730 (N.D. Ohio 1893).

So firmly established is the equitable principle that mandatory preliminary injunctive relief will be

granted only to maintain the *status quo ante litem* that the Federal district courts have refused, through the years, to grant relief beyond that limited scope. See *Clune* v. *Publishers Assoc. of New York City*, 214 F. Supp. 520 (S.D.N.Y. 1963); *Gantt* v. *Clemson Agr. Coll. of So. Car.*, 208 F. Supp. 416 (W.D. So. Car. 1962); *Willheim* v. *Murchison*, 203 F. Supp. 478 (S.D.N.Y. 1962), aff'd *Willheim* v. *Investors Diversified Services, Inc.*, 303 F. 2d 276 (2d Cir. 1962); *Winton Motor Carriage Co.* v. *Curtis Publishing Co.*, 196 Fed. 906 (E.D. Pa. 1912); and *American Lead Pencil* v. *Schneegass*, 178 Fed. 735 (N.D. Ga. 1910).

In those cases where the district courts have exceeded their equity jurisdiction and granted relief requiring affirmative action beyond that necessary to reinstate a pre-existing *status quo*, they have been summarily reversed. See *Tanner Motor Livery* v. *Avis, Inc.*, 316 F. 2d 804 (9th Cir. 1963); *Miami Beach Federal Savings and Loan Assoc.* v. *Callander*, 256 F. 2d 410 (5th Cir. 1958); *Warner Bros.* v. *Gittone*, 110 F. 2d 292 (3d Cir. 1940); and *United States* v. *Adler's Creamery*, 107 F. 2d 987 (2d Cir. 1939).

A correlative equity principle is that the merits of the controversy are not to be decided on an application for preliminary relief. *Tanner Motor Livery* v. *Avis, Inc.*, *supra*; and *Miami Beach Federal Savings & Loan Assoc.* v. *Callander*, *supra*. From this principle has developed the firmly rooted rule that where the granting of a preliminary injunction would give to the plaintiff all the relief to which he would be entitled were he to obtain a final decree in his favor on the merits, the request for preliminary relief should be denied. *Tanner Motor Livery* v. *Avis, Inc.*, *supra*; *Mack* v. *General Motors Corp.*, 260 F. 2d 886 (7th Cir.

1958); *Westinghouse* v. *Free*, 256 F. 2d 806 (7th Cir. 1958); *United States* v. *Adler's Creamery, supra*; *Gantt* v. *Clemson Agr. Coll. of So. Car., supra*; *Willheim* v. *Investors Diversified Services, Inc., supra*; and *American Lead* v. *Schoegass, supra*.

In each of the instant cases, the application of respondents for injunctive relief both temporary and permanent was to alter a pre-existing status in their favor. To give them such relief preliminarily is to give them what they would at most be entitled to if they had succeeded on the merits after trial and appeal. As the Third Circuit said in *Warner Bros.* v. *Gittone, supra*:

> . . . . the effect of the preliminary injunction which the court granted was not to preserve the status quo but rather to alter the prior status of the parties fundamentally. Such an alteration may be directed only after final hearing, the office of a preliminary injunction being, as we have pointed out, merely to preserve pendente lite the last actual noncontested status which preceded the pending controversy. . . .
>
> Irreparable loss resulting from refusal to accord plaintiff a new status, as distinguished from interference with rights previously enjoyed by him, does not furnish the basis for interlocutory relief. 110 F. 2d 292, 293.

(b) Other Statutes

In addition to its stated reliance on 28 U.S.C. § 1651, the Court of Appeals has referred to 28 U.S.C. §§ 1291 and 1292 as sources of such authority (App. pp. 1a, 2a, 80a). 28 U.S.C. § 1291 confers upon courts of appeals "*jurisdiction of appeals* from all final decisions of the district courts of the United States. . . ." 28 U.S.C. § 1292(a)(1) gives the courts of appeals

"*jurisdiction of appeals* from: (1) Interlocutory orders of the district courts of the United States . . ." (italics ours).

Petitioners submit that the Fifth Circuit is clearly in error in its reference to these provisions. Both sections confer jurisdiction over the merits of an appeal, not a new and different writ power. Petitioners concede that these appeals are properly pending in the Fifth Circuit, that that Court's jurisdiction extends to their merits. What we say is that this does not concern the form in which the Court must exercise its admitted jurisdiction, this does not change the nature of the judicial process.

(c) Opinions Cited by the Court of Appeals

In its opinions in these cases, the Court of Appeals has cited as its precedent on appellate injunctive power the cases themselves. It has additionally cited decisions, not here relevant, to distinguish between final and interlocutory orders, the power of District Courts over substantive aspects of school plans, and the power of a Court of Appeals to make its mandate effective through District Court orders.

But, apart from the cases for which review is here sought no other decision referred to by the Court of Appeals is authority for the existence of appellate power to issue the type of injunction in question. Although four other decisions are cited for the claimed authority, each of them concerns only a prohibitory order intended to prevent a change in the *status quo* which would make ineffective the appellate remedy.

United States v. *Wood*, 295 F. 2d 772 (5th Cir. 1961), (cited in *Gibson*, App. p. 80a) reversed a denial by the

District Court of a temporary restraining order against state prosecution pending a hearing for preliminary injunction because the District Court's action determined "substantial rights of the parties which will be irreparably lost if review is delayed until final judgment" (295 F. 2d 772, 778).[5]

Cooper v. *Aaron*, 358 U.S. 1 (1958) was also cited in *Gibson*. It affirms *Aaron* v. *Cooper*, 257 F. 2d 33 (8th Cir. 1958), reversing a District Court suspension of a court approved school integration plan after a hearing of the case on the merits. In its *Stell* opinion (App. p. 1a), the Fifth Circuit cited the other *Aaron* v. *Cooper* decision, 261 F. 2d 97 (8th Cir., 1958), restraining the leasing of public schools to a private school corporation pending a final determination on the merits. Also cited in *Stell* was *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399 (1923), where this Court upheld the power of a Court of Appeals under the "All Writs" statute to direct a District Court to enjoin a party to a suit before it from interfering with the Court's process by bringing a conflicting suit in another jurisdiction.

Your petitioners submit that none of the foregoing decisions constitutes acceptable precedent for the extraordinary writ powers claimed by the Court of Appeals in the instant cases.

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[5] Since the granting or denial of a temporary restraining order is not ordinarily appealable, the Circuit held this to be a reviewable "final order" under 28 U.S.C. § 1291.

II. THE ORDERS SOUGHT TO BE REVIEWED ARE IN CONFLICT WITH THE DECISIONS IN OTHER CIRCUITS AND WITH PRIOR DECISIONS IN THE FIFTH CIRCUIT.

Your petitioners' research has found only four other cases in which affirmative interlocutory injunctions approximating final relief have been asked of a United States Court of Appeals. In each of the four such relief has been denied.

In *Dunn* v. *Retail Clerks International Association*, 299 F. 2d 873 (6th Cir. 1962), the Court of Appeals refused to issue a mandatory injunction pending appeal compelling a regional director of the National Labor Relations Board to bring legal action against alleged unlawful picketing or, in the alternative, to issue an injunction directly enjoining the picketing. The relief had been denied by the District Court, in an action brought by the owners of the property being picketed, not by the regional director of the NLRB. The District Court also had denied an application for a mandatory injunction pending appeal.

The statement of the case by the Court of Appeals indicates its similarity to the present litigation (299 F. 2d 873, 874):

> "The relief prayed for here is much broader than a mere restraining order preserving the *status quo*.
>
> * * * * * * * * *
>
> "The mandatory order which appellants request is the ultimate relief sought in the District Court and in this appeal. To obtain such relief appellants would have to prevail on the merits of the case. We ought not to grant temporary relief which would finally dispose of the case on its merits . . ."

The same conclusion was reached by the Court of Appeals for the Ninth Circuit in *Hess* v. *Woods*, 185

F. 2d 404 (9th Cir. 1950). The District Court had denied an injunction against the continuing enforcement of the Housing and Rent Act of 1947 on the ground that it was being asked to change the *status quo*. Plaintiffs applied to the Court of Appeals for an immediate "restraining order" and "injunction" against the Housing Expediter and his subordinates, which in denying the application, stated (185 F. 2d 404):

> "In short, we are asked to suspend all activity of an important governmental agency before the appeal is before us for adjudication as to whether the District Court should take jurisdiction and try the case on the merits. No order with such far-reaching consequences should be made by any court before the merits of the controversy have been tried and adjudicated."

In two earlier civil rights type cases, the Court of Appeals for the Fifth Circuit has itself denied mandatory injunctive relief pending determination of the merits of the appeals on the same ground, following denials of such injunctions by the trial court. In *Meredith* v. *Fair*, 305 F. 2d 341 (5th Cir. 1962), an appeal was taken from a District Court denial of an interlocutory order compelling a state university to admit the negro plaintiff. The plaintiff then moved the Court of Appeals for such an injunction during the pendency of his appeal. In denying this motion, the Court noted that "the testimony taken before the district court is not yet available to this Court" and stated that judgment should be withheld until there had been "an opportunity to study the full record and testimony on the hearing before the district court" (*id.*, 341-2).

The same ruling was made in *Greene* v. *Fair*, 314 F. 2d 200 (5th Cir. 1963), where the District Court had abstained from ruling on plaintiff's university admis-

sion request, pending his applying to the admissions committee of the school. Plaintiff prayed for an injunction pending appeal to compel his immediate admission, asserting that 28 U.S.C. § 1651 gave the Court power to take such action. The Court denied any interlocutory mandatory relief, pointing out that (*id.*, 202) "The rules of this Court make possible a prompt hearing of all regularly docketed appellate cases."[6]

As to the views of that Court on such injunctions when issued by a District Court, Chief Judge Tuttle has stated:

> "Upon analyzing the trial court's order, issued without any evidence being submitted, even though perhaps at least partially at the instigation and insistence of the litigants, it appears much broader than the relief requested and than the question at hand. The matter before the court was a motion for a preliminary injunction which by its nature has the purpose of preserving the status quo to prevent irreparable injuries until the merits of the issues can be decided.
>
> * * * *
>
> "The judgment awarded appears to provide the plaintiffs with practically all of the relief, if not more, than they sought on the merits. . . .
>
> * * *
>
> "We have repeatedly held that an order for a temporary injunction does not and cannot decide

[6] Possibly because nothing is left to be accomplished by a hearing on the merits, it is only in *Stell* of the four cases here considered that respondents have filed a record or taken other action to bring the matter on for a hearing on appeal. Moreover, in *Stell* within the past week, appellants have moved for further time to file a supplemental record covering District Court proceedings directed by the interlocutory order here complained of and which occurred *after the appeal was taken*—necessarily relevant only to issues created by the appellate injunction, not the merits of the case as tried!

the merits of the case . . ." *Miami Beach Federal Sav. & Loan Assoc.* v. *Callander*, 256 F. 2d 410, 415 (5th Cir. 1958)

III. THIS COURT, IN THE EXERCISE OF ITS SUPERVISORY POWERS OVER THE LOWER FEDERAL COURTS, SHOULD VACATE THE INJUNCTIONS GRANTED IN THESE CASES AND REMAND TO THE COURT OF APPEALS FOR PROMPT HEARINGS ON THE MERITS.

The procedural issue raised by this application is a narrow, but extremely important one in the administration of justice. There is no effective control except judicial self-control in defining the incidents of judicial power. It is in cases such as these four, whose merits concern deeply controversial issues, that courts will always have the greatest difficulty in adhering to established practice.

Mr. Justice Holmes' famous dissent in *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400-1 (1904), describes the problem:

> "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend."

Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 149 (1951), recognized that where legal issues were "inescapably entangled in political controversies" and "touch the passions of the day," it was the duty of the Courts to "dispose of a controversy within the narrowest confines that intellectual integrity per-

mits." Concurring in *Dennis v. United States*, 341 U.S. 494, 528 (1951), he said:

> "Unless we are to compromise judicial impartiality and subject these defendants to the risk of an *ad hoc* judgment influenced by the impregnating atmosphere of the times, the constitutionality of their conviction must be determined by principles established in cases decided in more tranquil periods."

This Court in *DeBeers Mines v. United States*, 325 U.S. 212, 222 (1945), adhered to precedent in the face of strong pressure from the Government to increase the scope of judicial authority:

> "This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such."

* * *

The powers exercised by the Court of Appeals are not known to equity, are not granted by statute, they circumvent the established course of appellate review, directly affect the integrity of the judicial process, the administration of the courts, and create conflict between circuits. Review by certiorari should be granted, as prayed.

Respectfully submitted.

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